In the Supreme Court of the United States

No. [redacted]324

October Term, 1921.

W. H. Phipps, and W. H. Phipps as Director of The Department of Commerce of the State of Ohio,

Appellant,

vs.

The Cleveland Refining Company of Cleveland, Ohio,

Appellee.

BRIEF OF APPELLEE.

Chamberlin & Fuller,

Solicitors for Appellee.

In the Supreme Court of the United States

No. 865.
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W. H. Phipps, and W. H. Phipps as Director of The Department of Commerce of the State of Ohio,
Appellant,

vs.

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Appellee.

BRIEF OF APPELLEE.

STATEMENT OF CASE.

Briefly stated this action questions the constitutionality of the Ohio oil inspection law as violating the provisions of the Constitution of the United States, Article I, Sections 8 and 10 thereof.

The provisions of the Act of the General Assembly of May 19th, 1915 are set out in the memorandum opinion of the lower court at page 78 *et. seq.* of the Record. The fees collected from July 1st, 1915 to June 30th, 1920 amounted to $639,057.47, the disbursements were $321,188.68—more specifically stated at page 6 of the Record—so found by the court (p. 80 Record) and admitted by the appellant (p. 15 Record). Upon the au-

thority of *Foote vs. Maryland*, 232 U. S. 494, and *Standard Oil Co. vs. Graves*, 249 U. S. 389 approving *Castle vs. Mason*, 91 O. S. 296, the lower court finds the whole act aforesaid null and void and issued its decree as set out at page 86 of the Record.

That the decision of the lower court is sound is shown by cases considered by this Court subsequently decided citing the decisions *supra*:

Askren vs. Continental Oil Co., 252 U. S. 444.
Bowman vs. Continental Oil Co., 256 U. S. 642.
Texas Company vs. Brown, April 17, 1922.

EXCEPTIONS OF APPELLANT.

Two exceptions are taken to the decision of the lower court by appellant.

1. The State's cost of interstate inspection is greater than the fees charged therefor.

2. In practical administration the comparative cost of interstate inspection is ascertainable as distinguished from the cost of intrastate inspection. (p. 88 Record.)

The two exceptions are really one which is that the Ohio Act is severable in its application to interstate and domestic commerce; that under such severance it will appear that the inspection of oil and petroleum products in interstate commerce costs the state more than the fees collected and that the inspection law when applied to domestic commerce is transmuted into some sort of excise tax valid as to such commerce but invalid as to interstate commerce.

The effort is acrobatic and when made at the hearing the lower court refused to respond (Record 82 *et seq.*).

As the lower court aptly says the Act does not contemplate a separation of interstate and intrastate shipments and contains no provision for a separate record or accounting, and such provisions can not be imported into it by implication.

The history of the Act plainly shows that the legislative intent was to cure the repugnancy of the preceding act found invalid in *Castle vs. Mason*, 91 O. S. 296, by reducing the fees provided for therein from seven cents to three cents per barrel for bulk inspections since the re-enactment was made in the same words in all provisions except as to the amount of the fees. As the lower court said it was a police measure and not a tax law, requiring the inspection of all oil and gasoline before sale in the state.

Section 860 requires all oil to be inspected within the state and if in tank cars, as is now the custom, delivery in packages being too expensive, a certificate containing the car number must be issued and attached to the car before unloading either at the refinery if within the state or at the delivery station at the direction of the inspector, so whether from within or without the state the inspection incurring the expense must be made in the original package and a lien is created at once for the fees charged.

Appellant urges that while the law admittedly provides for no separation yet by administrative interpretation, and rules and regulations of his department he may legislate to supply the deficiency and having shown that the cost of inspection of interstate shipments of oil is equal to or greater than the fee the repugnancy to the Federal Constitution is removed and the Act becomes valid; that the act as to intrastate commerce is not a police law as intended but an excise tax, not made so by

solemn enactment under the carefully guarded provisions of the State Constitution by the legislative branch of the state, but by administrative interpretation. This is more novel than convincing.

Supposing fifty per cent of the inspections of interstate shipments show an excess of fee over cost, must he legislate again?

It is readily apparent from an examination of the record in this case that the officials charged with the enforcement of this inspection law kept no accurate records showing separately the costs incurred and the fees received from inspections of interstate shipments as distinguished from inspections of purely intrastate shipments. (See testimony of W. H. Phipps, page 25 of Record.) The state made an effort, somewhat ingenious, to show that the cost of inspecting interstate shipments exceeded the fees received therefrom. Exhibits were introduced in evidence based upon the showing in the various districts of the state for short periods of time, through which it was claimed losses running from nine cents to $161.91 were sustained from inspecting interstate shipments. The value of these exhibits and of the fugitive figures contained therein to the contention of the state is entirely destroyed by the statement of Mr. Phipps on cross-examination that he had not summed up the entire state to determine the cost of inspection of the interstate shipments and that he "would not be justified in making a conclusion so that I could give all the figures and state the exact amount." Even these figures could not be positively identified as referring to interstate shipments. It is admitted that the records do not "show all of the inspections that were made of interstate shipments into the state of Ohio," "because we haven't the complete record." (W. H. Phipps, Page 23 Record).

The most that can then said of these exhibits and the figures they contain is that they serve to confuse the issue. Their manifest paucity and inaccuracy cannot be cured by the arithmetical calculations on pages 16 and 17 of appellant's Brief.

The evidence of the state, (nearly all given over objection of the appellee) on the relative cost and expense of inspections of interstate shipments is patently dubious if not fallacious. At best it merely demonstrates the possibilities of an ingenious administration of the law not contemplated within the statute nor anticipated by the General Assembly of Ohio in its enactment. The rules and regulations of an administrative official or body are intended solely for the purpose of effectuating a statute. It is well established that a statute cannot be varied, extended, augmented or enlarged by purely administrative rules and regulations. In short it is not given to an administrative official to usurp purely legislative functions.

Blue vs. Beach, 155 Ind. 121, 131.

State vs. Loechner, 65 Neb. 814, 821; 59 L. R. A. 915, 918.

I Corpus Juris, 1240, note 78.

"It is our duty to construe the law as written and that of the Legislature to make or modify it." *McCoach vs. Phila.,* 117 Atl. 71-73.

In the case of *Ratterman vs. Western Union Telegraph Co.,* 127 U. S. 411, the severance of the tax imposed as a single act of the Ohio legislature was made by stipulation of the facts, so that the severance was presented with the case, the tax condemned in toto as to interstate commerce (messages) but upheld as to intrastate.

No such thing could be done in this case as it does not contemplate a tax question. It goes no farther than an inspection law, purely a police measure and applies indiscriminately to all the products required to be inspected and the commingled receipts paid over to the Treasurer of the State.

In *Askren vs. Continental Oil Co.*, 252 U. S. 444, and its sequence *Bowman vs. Continental Oil Co.*, 256 U. S. 642, on the question whether a license tax on gasoline sold or used within the State of New Mexico was valid, it was held, both as to license and tax, to be invalid as to interstate commerce but valid as to domestic sales. The Court below said, Rec. 84:—

> "In the *Bowman* case the Supreme Court regarded the application of the tax to interstate commerce as separate from its application to intrastate commerce, condemning the impost on the former but sustaining it on the latter. * * * The Act makes no such separation of cost, nor does it afford any means for so doing."

In *Texas Co. vs. Brown*, Adv. Opinions No. 14, page 428, decided April 17, 1922, the nearest approach to the instant case, the legislature avoided it by an act passed after the question was raised providing that the entire inspection act "shall never be held or construed to apply to oils and gasoline, benzine or naphtha, or other articles mentioned in said laws, imported into this state in interstate commerce and intended to be sold in the original and unbroken tank cars or other original receptacles or packages, and so sold, while same are in interstate commerce." The Court said, page 430:—

> "In view of the provisions of this act we need spend no time in discussing whether the judges were right in following the rule of practical separability in administration, applied by this court to a *taxing*

law single on its face, in *Ratterman vs. Western Union Telegraph Co., supra,* a case following, since the decision below, in *Bowman vs. Continental Oil Co.,* 256 U. S. 642. Any question whether the same or a different rule ought to be applied to an *inspection law* employed for the purposes of revenue taxation, *based upon doubt as to the intent of the legislature to* permit the system to remain in force with respect to products stored within the state or sold in domestic commerce, when determined to be enforceable as to the like goods while in interstate commerce, is set at rest by the new act, which, under the circumstances must be accepted as manifesting an intent that the system shall remain in effect as to products that are subject to the taxing power of the state, as clearly as it declares a contrary purpose as to products still remaining in interstate commerce."

Both the lower court and this Court condemned the tax on interstate commerce which sustains our contention.

The Ohio Act in question can not be an inspection law as to interstate commerce and at the same time a tax law as to intrastate commerce for if regarded as an inspection law, a police measure, as to both, it is not severable, and must be treated as such as it and its predecessor has been for a half century.

If it be a tax law as to both it is void *ab initio* as to interstate commerce under repeated decisions of this Court and does not conform as such to the constitutional requirements of the state constitution as to domestic commerce.

CONCLUSION.

In conclusion we urge upon the notice of the Court these considerations:

1. The Ohio Inspection Act in question is a police measure, the manifest intent of the legislature in its enactment was to have it avoid becoming a revenue measure by reducing the fees provided in a former act framed in the same words as to general provisions and found invalid by the Supreme Court of the state in *Castle vs. Mason, supra.*

2. There is no intent shown to enact a tax law; no proper rule of construction to interpret it as such and no administrative record giving it such practical effect.

3. The so-called record of testimony does not show facts upon which any conclusion can be based as to the cost of inspection and is merely inferential and speculative.

4. There is no basis for a separation of the provisions of the Act by court construction or by administrative interpretation.

5. There is no error in the opinion of the lower court and its judgment should be affirmed.

Respectfully submitted,

CHAMBERLIN & FULLER,
Solicitors for Appellee.

Dated at Cleveland, Ohio, this 1st day of August, 1922.

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